

**UNITED STATES DISTRICT COURT  
NORTHERN DISTRICT OF OKLAHOMA**

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State of Oklahoma, et al.,	)	
	)	05-CV-0329 GKF-SAJ
	)	
Plaintiffs,	)	
v.	)	<b>THE CARGILL DEFENDANTS’</b>
	)	<b>MOTION IN LIMINE TO EXCLUDE</b>
Tyson Foods, Inc., et al.,	)	<b>STATEMENT OF COUNSEL AND</b>
	)	<b>SUPPORTING BRIEF</b>
Defendants.	)	
	)	

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Defendants Cargill, Inc. and Cargill Turkey Production, LLC (“the Cargill Defendants”), through their undersigned attorneys, hereby move the Court to bar Plaintiffs from offering against the Cargill Defendants the statement of the Tyson Defendants’ counsel Mr. Pat Ryan in his opening statement in the preliminary injunction hearing in this action. Counsel for the Tyson Defendants has filed a motion addressing the same topic (Dkt. No. 2393) and listed the Cargill Defendants as additional filers of that motion, in accord with the common practice among the parties. In this particular instance, however, the Cargill Defendants wish to offer the Court a slightly different argument, and therefore file this separate motion on their own behalf.

**FACTUAL BACKGROUND**

During opening statements at the February 19, 2008 Preliminary Injunction hearing, the Court and Tyson attorney Patrick Ryan engaged in the following exchange:

MR. RYAN: I would say to you that poultry litter has – as indicated by the affidavit of Dr. Coale, an agronomist from Maryland, it’s in the mountain of material you have. He tells you that there are 13 elements in poultry litter all of which are essential for plant growth, for healthy plant growth. One – the state is focusing on but one of those elements, phosphorus. The other 12 are, to my knowledge, not being overapplied and are needed for plant growth.

THE COURT: Well, but here they're focusing on E. coli and bacteria, not on phosphorus; correct?

MR. RYAN: I'm sorry, Your Honor?

THE COURT: In this proceeding are they not focusing on bacteria as opposed to phosphorus?

MR. RYAN: Yes, Your Honor. No, that's absolutely right, but we're talking about what the land needs and what's being overapplied.

THE COURT: Right, right.

MR. RYAN: I think their argument only goes to the phosphorus, to the one element of phosphorus. It does not address the other twelve elements which I say are needed for plant growth and are beneficial to the crops and plants and pastures and forage. And I don't think there's any question but that there has been an overapplication of litter on some or many farms. That's not an issue in our book. I'm certainly not arguing that in terms of phosphorus.

Feb. 19, 2008 PI Hrg. Tr. at 45:19-46:18: Dkt. No. 1613.

Since that time, Plaintiffs have repeatedly suggested that Mr. Ryan's statement constitutes an admission by all Defendants that poultry litter has been overapplied in the IRW. See, e.g., Mar. 12, 2008 PI Hrg. Tr. at 14:2-4: Dkt. No. 1636 ("[W]e also have the admission by the defendants in their opening that there has been an over-application of poultry waste with respect to phosphorous."); Pls.' Mot. for Partial Summ. J. & Integrated Brief in Support at 16: Dkt. No. 2062 (citing Ex. 61). In light of these efforts by Plaintiffs, the Cargill Defendants' present motion seeks to bar any such attempted use of the Tyson Defendants' attorney's statement against the Cargill Defendants at trial.

## **ARGUMENT**

### **I. COUNSEL'S STATEMENT IS NOT EVIDENCE.**

The Court should bar any attempt by Plaintiffs to introduce the statement in question at trial because an attorney's opening statement is not evidence. See, e.g., 3 Fed. Jury Prac. & Instr. § 101.44 (5th ed. 2000). This argument is ably set forth in Section I of the existing motion

(Dkt. No. 2393 at 3-5), and the Cargill Defendants join that section rather than repeating the same argument here.

## **II. COUNSEL’S STATEMENT WAS NOT MADE ON BEHALF OF THE CARGILL DEFENDANTS.**

The Court should bar the use of counsel’s statement against the Cargill Defendants because the statement was not made on behalf of the Cargill Defendants. Mr. Ryan, the attorney who made the statement, represents only the Tyson Defendants (Tyson Foods, Inc., Tyson Poultry, Inc., Tyson Chicken, Inc., and Cobb-Vantress). He is identified as an attorney for the Tyson Defendants in the PI hearing transcript (PI Hrg. Tr. at 2 (“For the Tyson Foods Defendants: ... Mr. Patrick M. Ryan”): Dkt. No. 1613)), and orally identified himself that way on the record. Id. at 5:6 (“MR. RYAN: Pat Ryan for Tyson Foods, Your Honor.”) Mr. Ryan never represented in his opening statement, either at the beginning or anywhere else, that he was appearing on behalf of any party other than the Tyson Defendants. See id. at 42-65.

Although the Cargill Defendants have the utmost respect for Mr. Ryan and his legal abilities, they have not authorized him to represent them or act on their behalf in this action, and he is not their attorney. The Cargill Defendants have their own attorneys in this case to act on their behalf, and those attorneys neither made nor adopted the statement at issue.

The Cargill Defendants recognize that Plaintiffs’ decision to sue over a dozen defendants in this action has forced the Court and the parties into certain efficiencies, and the Defendants have sought to aid the Court by making joint submissions and avoiding duplicative argument wherever possible. The Defendants are still, however, separate entities represented by separate counsel. Nothing in the Cargill Defendants’ submissions or presentations has waived their right to be represented by (and only by) their own attorneys, and nothing in the Court’s rulings has suggested any intention to force consolidated counsel on the Defendants against their will.

Indeed, during the course of the preliminary injunction hearing, different attorneys representing different Defendants regularly asked different questions of the same witnesses and gave (or sought to give) separate closing arguments, reflecting the different concerns, focuses, and strategies of the different parties. Feb. 22, 2008 PI Hrg. Tr. at 945, 967, 972, 973, 974: Dkt. No. 1642) (Taylor cross examination); Mar. 12, 2008 PI Hrg. Tr. at 32, 75, 80: Dkt. No. 1636 (closings).

## **CONCLUSION**

The threshold showing necessary to introduce a statement as the admission of a party is the showing that the party against whom the statement would be introduced actually made the statement. Here, neither the Cargill Defendants nor their agent made the statement in question, and the statement is therefore inadmissible as to them. Moreover, even assuming the statement of Tyson's attorney were otherwise admissible on some ground, its use against the Cargill Defendants would be highly and unfairly prejudicial, far outweighing any arguable probative value. See Fed. R. Evid. 403. The Court should bar the use of the statement against Cargill, Inc. or Cargill Turkey Production, LLC.

Respectfully submitted,

RHODES, HIERONYMUS, JONES, TUCKER &  
GABLE, PLLC

By: /s/ John H. Tucker

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### **CERTIFICATE OF SERVICE**

I certify that on the 5th day of August, 2009, I electronically transmitted the attached document to the Clerk of Court using the ECF System for filing and transmittal of a Notice of Electronic Filing to the following ECF registrants:

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